Supreme Court, U.S.
FILED
NOV 14 2002
OFFICE OF THE CLERK

No. 02-566

IN THE
SUPREME COURT OF THE UNITED STATES

CAROL HARLEY, *et al.*,
Petitioners,

v.

3M COMPANY, *et al.*,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit

BRIEF *AMICI CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

JENIFER BOSCO
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
44 Montgomery Street, # 2080
San Francisco, CA 94104
(415) 296-7629

JEFFREY G. LEWIS
DANIEL M. FEINBERG
LEWIS & FEINBERG, P.C.
436-14th Street, Suite 1505
Oakland, CA 94612-2703
(510) 839-6824

Counsel for *Amicus Curiae* NELA

MARY ELLEN SIGNORILLE*
AARP FOUNDATION

MELVIN R. RADOWITZ
AARP

601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

*Counsel of Record

Counsel for *Amicus Curiae* AARP

19 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

REASONS FOR GRANTING THE PETITION 4

I. ERISA SPECIFICALLY CONFERS ON PLAN PARTICIPANTS THE RIGHT TO BRING SUIT TO REMEDY ANY LOSS TO A PLAN RESULTING FROM A BREACH OF FIDUCIARY DUTY AND THIS RIGHT IS A CRUCIAL PART OF ERISA'S ENFORCEMENT SCHEME. 5

A. ERISA §§ 502(a)(2) and 409 Direct That Participants Can Sue in a Representative Capacity on Behalf of the Plan for Losses to the Plan Resulting from Breaches of Fiduciary Duty. 6

B. Participants and the Plan Suffer An "Injury in Fact" When a Fiduciary Breaches its Duty to the Plan and the Participants. 9

1. The 3M Plan has suffered an "injury in fact" because it lost millions of dollars. 9

2. Participants have suffered an injury in fact because the plan fiduciaries violated statutorily created rights under ERISA. .. 10

3. Participants have suffered an actual or threatened injury because their benefits are less secure and their opportunity for a benefit increase is diminished. 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.,
472 U.S. 559 (1985) 7

Drolet v. Healthsource, Inc.,
968 F. Supp. 757 (D.N.H. 1997) 11

Fed. Election Comm'n v. Akins,
524 U.S. 11 (1998) 11

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,
528 U.S. 167 (2000) 11, 12

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002) 3

Harley v. 3M,
284 F.3d 901, *reh'g en banc denied*,
2002 U.S. App. LEXIS 14347 (8th Cir. 2002) . 3, 5, 7, 10

Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.,
530 U.S. 238 (2000) 3, 6, 8

Inland Steel Co. v. NLRB,
170 F.2d 247 (1948) 12

Inter-modal Rail Employees Ass'n v. Atchison, Topeka, & Santa Fe Railway Co.,
520 U.S. 510 (1997) 8

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) 10

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 10, 11

Lujan v. Natl. Wildlife Fed'n,
497 U.S. 871 (1990) 12

Massachusetts Mutual Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 3, 6, 7, 8, 9

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) 3, 6, 8

Trafficante v. Metropolitan Life Ins. Co.,
409 U.S. 205 (1972) 10

Varity Corp. v. Howe,
516 U.S. 489 (1996) 3, 6, 8

Vermont Agency of Natural Resources v. United States ex rel. Stevens,
529 U.S. 765 (2000) 10

Warth v. Seldin,
422 U.S. 490 (1975) 10, 11

STATUTES

Employee Retirement Income Security Act (ERISA),
29 U.S.C. § 1001 *et seq.* 1, 2, 3, 7

ERISA § 3(3), 29 U.S.C. § 1002(3) 8
ERISA § 3(7), 29 U.S.C. § 1002(7) 8
ERISA § 201(1), 29 U.S.C. § 1051(1) 8
ERISA § 301(1), 29 U.S.C. § 1081(1) 8
ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) 3, 9
ERISA § 409, 29 U.S.C. § 1109 ..... 6, 7, 8, 10
ERISA § 409(a), 29 U.S.C. § 1109(a) 6, 8
ERISA § 502(a), 29 U.S.C. § 1132(a) 4, 6, 8
ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) 6, 7, 8, 9
ERISA § 4022, 29 U.S.C. § 1322 12

MISCELLANEOUS

V. Anand, *3M Decision First of Its Kind*, PENSIONS & INVESTMENTS (April 2002) 13

Kandarian Says PBGC Surpluses Declining as Underfunded Plans Increase, 209 Daily Lab. Rep. (BNA) A-2 (Oct. 29, 2002) 13

U.S. Department of Labor, *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS' REQUEST FOR REHEARING *EN BANC* BEFORE THE EIGHTH CIRCUIT 4, 5

U.S. Department of Labor, PWBA TASK FORCE ON ASSISTANCE TO THE PUBLIC (1992) 3

U.S. FEDERAL RESERVE BOARD, FLOW OF FUNDS ACCOUNTS OF THE UNITED STATES, FOURTH QUARTER 2001 (Washington, D.C.: Board of Governors of the Federal Reserve System 2001) 2

PENSION AND WELFARE BENEFITS ADMINISTRATION – OPPORTUNITIES EXIST FOR IMPROVING MANAGEMENT OF ENFORCEMENT PROGRAM, GAO-02-232 (March 2002) . 3

D. Henry, *The New Pinch From Pensions*, BUSINESS WEEK (Aug. 5, 2002) 13

D. McGill, K. Brown, J. Haley & S. Schieber, FUNDAMENTALS OF PRIVATE PENSIONS, *Management of Pension Plan Assets Policy* (7th ed. 1996) 12

Pension Benefit Guaranty Corporation, *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR REHEARING *EN BANC* BEFORE THE EIGHTH CIRCUIT 5, 12, 13

No. 02-566

IN THE

Supreme Court of the United States

CAROL HARLEY, *et al.*,

Petitioner,

v.

3M COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICI CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*[1/]

AARP is a nonprofit membership organization of more than 35 million persons age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older Americans. Approximately 45% of AARP's members are working. Many are participants in pension plans covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq*. These AARP members, as well as other older

---

[1/] No counsel for any party authored any portion of this brief. No persons other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

Americans, depend on these pension plans and the benefits paid from them for their economic security in retirement.

Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all citizens. In its efforts to promote independence, AARP works to foster the economic security of individuals as they age by attempting to ensure the availability, security, equity, and adequacy of public and private pension, health and other employee benefits.

The National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of more than 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who primarily represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters. NELA has devoted itself to supporting precedent-setting litigation affecting the rights of individuals in the workplace.

AARP's members, NELA's members' clients, and other participants in employee benefit plans rely on the Employee Retirement Income Security Act (ERISA) to protect their rights under private employer-sponsored employee benefit plans. 29 U.S.C. § 1001 *et seq.* As of the end of 2001, employer-sponsored private pension plans alone had over $ 4.237 trillion in assets, the single largest pool of capital in the United States. U.S. FEDERAL RESERVE BOARD, FLOW OF FUNDS ACCOUNTS OF THE UNITED STATES, FOURTH QUARTER 2001 (Washington, D.C.: Board of Governors of the Federal Reserve System 2001), Table L.119. Such substantial assets lend themselves to potential misuse and mismanagement.

It is important to AARP members, NELA's members' clients, and other pension plan participants to be able to ensure a pension plan is made whole for a loss where plan fiduciaries have breached their duty to prudently invest plan assets. These participants have a significant interest in ensuring that plan assets will be available to pay the benefits to which they are

entitled and are used exclusively for the benefit of participants. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A); *cf. Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140-43 & n.8 (1985) (ERISA was passed to prevent the misuse and mismanagement of plan assets). These participants also have significant interests in ensuring that there are sufficient plan assets available to provide benefit increases and cost of living adjustments to guarantee adequate retirement income. Finally, they have an interest in ensuring proper and prudent plan administration and management of plan assets by being able to sue the fiduciaries of their own plans, especially because the Department of Labor consistently has had inadequate resources to police the pension system. *See, e.g.*, PENSION AND WELFARE BENEFITS ADMINISTRATION – OPPORTUNITIES EXIST FOR IMPROVING MANAGEMENT OF ENFORCEMENT PROGRAM, GAO-02-232 at 2-3 (GAO, March 2002); U.S. Department of Labor, PWBA TASK FORCE ON ASSISTANCE TO THE PUBLIC, 1992.

AARP and NELA thus advocate on behalf of individuals throughout the country to protect the rights of participants in private, employer-sponsored employee benefit plans covered by ERISA, 29 U.S.C. § 1001 *et seq.* As part of their advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP and NELA have participated as *amicus curiae*, both jointly and singly, in numerous cases involving fiduciary duties and remedies under ERISA. *See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Harley v. 3M*, 284 F.3d 901, *reh'g en banc denied*, 2002 U.S. App. LEXIS 14347 (8th Cir. 2002).

The resolution of the issues herein will have a direct and vital bearing on these individuals' ability to police and protect their pension plans from mismanagement and to ensure monies for those benefits which will foster their economic security. In light of the significance of the issues presented by this case,

amici curiae respectfully submit this brief to facilitate a full consideration by the Court of these issues.[2/]

REASONS FOR GRANTING THE PETITION

In addition to the substantial conflict between the circuits on the questions presented by petitioners, a writ of *certiorari* is appropriate because the Eighth Circuit decision upsets the status quo for both employees and the Secretary of Labor by restricting participants' right to sue fiduciaries for breaching their fiduciary duties. If the Court does not grant the petition for a writ of *certiorari*, the Eighth Circuit's holding that participants in an allegedly-over-funded (by some measure) defined benefit pension plan do not have standing to bring suit for a breach of fiduciary duty will not only undermine the carefully integrated civil enforcement provisions of the Act, but as the Secretary of Labor stated in her *amicus* brief in support of petitioners' request for rehearing, it "will create an enormous burden for the Secretary as the only person with standing to bring such suits."[3/] DEPARTMENT OF LABOR *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS' REQUEST FOR REHEARING *EN BANC* BEFORE THE EIGHTH CIRCUIT at 1.[4/] With this unprecedented loss of the right to sue, employees' retirement security is thrown into jeopardy due to their inability to police

---

[2/] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[3/] The Eight Circuit's suggestion that the Secretary of Labor has standing, while participants do not, should be rejected. The structure of ERISA makes clear that Congress did not intend for government enforcement powers to lessen the power of participants and beneficiaries to police their own plans. ERISA § 502(a), 29 U.S.C. § 1132(a).

[4/] Given the support of both the Secretary of Labor and the Pension Benefit Guaranty Corporation of the Petitioners' Request for Rehearing *En Banc* and the participation of the Secretary of Labor before the Eighth Circuit, *amici* suggest that it is imperative that the government's views be sought regarding whether the petition for a writ of *certiorari* be granted.

and protect their own pension plan from imprudent or untrustworthy fiduciaries.

Moreover, although the Eighth Circuit stated that it was analyzing this case so as to avoid Article III standing, it in essence dragged through the back door of its statutory standing analysis an erroneous concept of Article III "injury in fact" jurisprudence. This case presents the Court with an opportunity to explain the types and extent of injuries needed to meet its injury in fact requirement.

I. ERISA SPECIFICALLY CONFERS ON PLAN PARTICIPANTS THE RIGHT TO BRING SUIT TO REMEDY ANY LOSS TO A PLAN RESULTING FROM A BREACH OF FIDUCIARY DUTY AND THIS RIGHT IS A CRUCIAL PART OF ERISA'S ENFORCEMENT SCHEME.

The Eighth Circuit found that the 3M pension plan's $20 million investment in the Granite Corporation, a hedge fund invested in collateralized mortgage obligation, became worthless. Because the plan had to write off the total amount of this investment, the Eighth Circuit found that "[t]his loss reduced the pool of Plan Assets," specifically disagreeing with the district court's holding that the investment had not caused the plan any cognizable harm. *Harley v. 3M*, 284 F.3d 901, 905 (8th Cir. 2002). However, the court then took a quantum legal leap, holding that ERISA did not authorize participants to sue because they had not suffered an "injury in fact" since the Plan supposedly had a surplus at the time the suit was filed.[5/] *Id.* at 906-07. Not only does this holding demonstrate a

---

[5/] The Eighth Circuit's decision raises the difficult conceptual issue of whether an on-going plan can ever be considered to have a surplus. The decision also raises the corollary issues of how and when such an alleged surplus should be valued. The separate briefs of Petitioners and *amicus* Pension Rights Center provide the Court with a detailed discussion of these important issues. In addition, the *amicus* briefs of the Secretary of Labor and the PBGC filed in Support of Petitioners' Request for Rehearing *En Banc* discussed these issues.

misunderstanding of ERISA's structure and unequivocal language, but it also relies on a faulty premise concerning the operation of defined benefit plans and the injury participants and beneficiaries suffer when fiduciaries misuse plan assets.

A. ERISA §§ 502(a)(2) and 409 Direct That Participants Can Sue in a Representative Capacity on Behalf of the Plan for Losses to the Plan Resulting from Breaches of Fiduciary Duty.

When interpreting ERISA's carefully integrated civil enforcement provisions under § 502(a), the Court repeatedly has looked at the plain language of ERISA, the evident care with which the civil enforcement provisions were crafted, the structure of the statue, and the policies underlying ERISA. Without exception, the Court has concluded that the precise language of the statute must be followed. The Court has been unwilling to read into ERISA implied claims or remedies, and it has been similarly unwilling to read limiting language into the statute. *See Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000);*Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. at 139. In contrast, the Eighth Circuit in this case did exactly what the Court has been unwilling to do in other cases. For this reason alone, the petition for a writ of *certiorari* should be granted.

Section 502(a)(2) states that "[a] civil action may be brought . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under § 409." 29 U.S.C. § 1132(a)(2). ERISA § 409(a) provides that not only will the plan be made whole for its losses caused by the breaching fiduciary, but the fiduciary shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. 29 U.S.C. § 1109(a).

In *Russell*, 473 U.S. at 139, the Court unambiguously concluded that § 502(a)(2) authorizes participants to bring an action on behalf of the plan against a fiduciary who has violated § 409, and that any recovery inures to the benefit of the plan as

a whole. The Court stated that inclusion of the Secretary of Labor as one of the four classes of party-plaintiffs in § 502(a)(2) demonstrates that "actions for breach of fiduciary duty [are to] be brought in a representative capacity on behalf of the plan as a whole. Indeed, the common interest shared by all four classes is the financial integrity of the plan." *Id.* at n.9.

Section 409 assesses personal liability on any fiduciary "to make good to such plan any losses to the plan resulting from such breach [of fiduciary duty]." 29 U.S.C. § 1109(a). Significantly, the loss to the plan must be caused by the breach of fiduciary duty.[6/] The underlying policy reason for this provision was Congressional concern for misuse and mismanagement of plan assets by fiduciaries. *Russell, supra,* at n.8. In the legislative history cited by the Court in *Russell,* no one in Congress mentioned different standards for fiduciary breaches depending on the funding status of the plan. The reason for the absence of such a distinction is simple. Congress was concerned with the manner in which the plan was administered and managed. As the Court has recognized, "one of the fundamental common-law duties of a trustee is to preserve and maintain trust assets." *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.,* 472 U.S. 559, 572 (1985). The Court stated that not only did the common law of trusts, upon which ERISA was predicated, dictate these responsibilities, but the plain provisions of ERISA did as well. *Id.*

Congress sought to achieve its goal of preventing financial mismanagement and abuse of employee benefit plans by providing participants with the information needed to police their own plans and authorizing them to bring suit if they found violations of the statute that injure the plans. ERISA § 2, 29 U.S.C. § 1001. ERISA defines the term "participant" broadly, encompassing "any employee or former employee of an employer, or any member or former members of an employee

---

[6/] By finding that "[t]his loss [from the investment] reduced the pool of Plan Assets," the decision made this necessary causation finding. *Harley v. 3M,* 284 F.3d 901, 905 (8th Cir. 2002).

organization, who is or may become eligible to receive a benefit of any type . . . ." ERISA § 3(7), 29 U.S.C. § 1002(7). Neither this section, § 409, nor § 502(a)(2) contain any restriction as to the type of participant or beneficiary who may sue. Nor do these statutory provisions contain any reference to surplus or overfunding which would limit the recovery to the plan even if the plan is overfunded.

Moreover, the plain language of § 409 confirms that the statute does not differentiate between underfunded and overfunded plans. 29 U.S.C. § 1109(a) ("any person who is a fiduciary with respect to a plan . . . shall be personally liable . . . to such plan any losses to the plan . . . and to restore to the plan . . . "). Indeed, ERISA's definition of a "plan" includes a welfare plan and a pension plan. ERISA § 2(3), 29 U.S.C. § 1002(3). In contrast, other statutory provisions do differentiate between types of plans. *See, e.g.*, ERISA §§ 201(1) & 301(1), 29 U.S.C. §§ 1051(1) & 1081(1). Accordingly, Congress' unqualified use of the term "plan" demonstrates that it intended that participants be able to sue through § 502(a)(2) to correct wrongdoing in any and all types of plans. *Inter-modal Rail Employees Ass'n v. Atchison, Topeka, & Santa Fe Railway* Co., 520 U.S. 510, 515 (1997) ("Had Congress intended to confine § 510's protection to "vested" rights, it could have easily substituted the term 'pension plan' . . . for 'plan' . . . . . But § 510 draws no distinction . . . ").

This reading of these provisions is consistent with the plain language of the statute, the Court's general interpretation of § 502(a), and the Court's unwillingness to read limitations into § 502(a) that contravene that provision's plain language. For example, in *Harris Trust*, 530 U.S. at 246, the Court was willing to read in any limitation on the universe of defendants who might be sued. *See also Varity Corp. v. Howe*, 516 U.S. 489; *Mertens v. Hewitt Assoc.*, 508 U.S. 248; *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. at 139. In contrast, the Eighth Circuit's decision reads participants' ability to police their own pension plan out of the statute. Indeed, the Eighth Circuit's decision suggests that participants must sustain direct economic injury in order to have standing to sue. The Court's jurisprudence has never been that limiting.

Under the Eighth Circuit's rationale, plan fiduciaries could use a dart board to make investment decisions and spend plan assets extravagantly on meetings and meals as long as the plan was overfunded. However, proper management of plan assets goes to the crux of a fiduciary's duty and to the heart of ERISA. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A); *cf. Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. at 140-43 & n.8 (ERISA was passed to prevent the misuse and mismanagement of plan assets). ERISA creates statutory rights and protections so that participants can ensure that their own pension plan is prudently managed. And, ERISA provides participants with the means to enforce those statutory rights and protections.

Given the Eighth Circuit's reliance on participants' purported absence of statutory standing under ERISA, the Court should grant the petition for a writ of *certiorari* for this reason.

However, because the Eighth Circuit appears to have imported into its ERISA standing analysis an erroneous conception of Article III standing, *amici* will briefly address the Eighth Circuit's rationale.

B. Participants and the Plan Suffer An "Injury in Fact" When a Fiduciary Breaches its Duty to the Plan and the Participants.

1. The 3M Plan has suffered an "injury in fact" because it lost millions of dollars.

As analyzed above, ERISA explicitly provides participants with standing to bring suit for both themselves and as representatives of the plan as an entity in order to remedy investment losses to the plan arising from breaches of fiduciary duty. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Whether participants suffer immediate and direct economic injury here is irrelevant where ERISA provides them with representational standing on behalf of the plan.

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court held that the injury need not be to the plaintiff directly, but instead could be to the

entity the plaintiff is representing. Specifically, the Court held that a federal *qui tam* statute in effect creates an assignment of the federal government's claim to the *qui tam* relator, so that the appropriate analysis of standing in a *qui tam* case focuses on whether there has been a cognizable injury to the government, not whether there has been a cognizable injury to the relator. *Id.* at 773-74. This literal assignment is one type of representational standing. The *Harley* court mistakenly assumed that ERISA expressly needed to assign part of the recovery from the plan in order for the participant to have standing. 284 F.3d at 907. However, unlike the statute at issue in *Vermont Agency,* there is no need to literally assign part of the recovery in order for the participant to have standing. Here, standing is clear because the participants are the statutorily designated agents of the plan, and therefore have standing based on agency principles. Even if the real concern of the Eighth Circuit was Article III standing, under *Vermont Agency*, participants would have constitutional standing.

2. Participants have suffered an injury in fact because the plan fiduciaries violated statutorily created rights under ERISA.

Where Congress has created statutory rights, this alone may result in a finding of Article III standing. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992), the Court reiterated the long-standing principle that the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing,'" citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute"), and other cases. *See also, Warth v. Seldin*, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (Civil Rights Act "showed a congressional intention to define standing as broadly as is permitted by Article III . . . insofar as tenants of the same housing unit are concerned."). More recent cases have continued the Court's rationale. *See*

Fed. Election Comm'n v. Akins, 524 U.S. 11, 19-25 (1998) ("there is a statute which . . . does seek to protect individuals such as respondents from the kind of harm they say they have suffered . . . ."); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 187 (2000) (a statutory grant of standing requires an interpretation designed to give full deference to the "legislature's range of choice.").

In *Drolet v. Healthsource, Inc.*, 968 F. Supp. 757, 759-760 (D.N.H. 1997), an ERISA case, the court relied on the above rationale to reject defendants' argument that plaintiffs lacked standing to obtain an injunction against fiduciary misrepresentations without a showing of financial harm flowing from those violations, citing to *Warth v. Seldin*, 422 U.S. at 500, as quoted by *Lujan*. The court found that because ERISA creates a "legally protected interest in receiving accurate information from the plan's fiduciaries," the deprivation of that information readily satisfied the injury in fact requirement. *Id.* at 760.

As discussed in section I. A., *supra*, ERISA creates a legally protected interest in having a fiduciary properly manage plan assets, separate and apart from any direct financial harm that may result to the participants from such a breach. *See* section I. B.3., *infra*. As in *Drolet*, the invasion of this interest created by the statute would be enough to satisfy Article III's injury in fact requirement, if that is the real issue here.

3. Participants have suffered an actual or threatened injury because their benefits are less secure and their opportunity for a benefit increase is diminished.

Even if the issue in this case was whether the participants suffered an "injury in fact" sufficient to confer Article III standing, participants clearly have suffered such an "actual or threatened injury." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. at 180-81. As a result of the fiduciary breach, the plan lost $20 million. *See supra* n.6. This reduction in plan assets caused participants injury both directly and indirectly.

Contributions made on behalf of participants to a defined benefit pension plan have long been considered deferred wages. *See Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948). Not surprisingly, participants view pension plan assets as "their money." The fiduciaries' mismanagement of participants' pension plan assets not only misuses those monies that are contributed on a participant's behalf to the plan in lieu of wages, but also reduces participants' retirement security. Thus, unlike *Lujan v. Natl. Wildlife Fed'n*, 497 U.S. 871 (1990), where plaintiffs could not demonstrate that they used specific federal land, there is no question here that participants rely on and will use these pension plan assets.

Without question, the $20 million investment loss makes the participants' benefits less secure. *See generally* D. McGill, K. Brown, J. Haley & S. Schieber, FUNDAMENTALS OF PRIVATE PENSIONS, *Management of Pension Plan Assets Policy* 646 (7th ed. 1996) ("Plan assets and their capacity to generate future investment earnings are the primary source, at any given time, of benefit security – the assurance that the accrued benefit rights of the plan participants will ultimately be honored."). It decreases the possibility of an increase in the amount of benefits for active employees or additional monies for those who have already retired.

Moreover, even assuming that a plan was overfunded at the time of the breach or lawsuit, *see supra* n.5, there is no guarantee that the overfunding will continue into the future or that the participants will be paid the full defined benefit as promised.[7] *See Kandarian Says PBGC Surpluses Declining as Underfunded Plans Increase*, 209 Daily Lab. Rep. (BNA) A-2 (Oct. 29, 2002). A plan's fortunes can quickly change as the

---

[7] Even though the Pension Benefit Guaranty Corporation (PBGC) insures defined benefit pension plans, the PBGC caps the amount of benefits it pays, limits the types of benefits it pays, and restricts the distribution options from a plan it terminates. 29 U.S.C. § 1322. *See also* PBGC *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR REHEARING *EN BANC* BEFORE THE EIGHTH CIRCUIT. Thus, the PBGC provides only a minimum guarantee of benefits.

collapse of Enron, Worldcom, Tyco, and Global Crossing illustrate. In fact, 3M's Pension Plan no longer appears to be overfunded. In its March 2002 filing with the Securities and Exchange Commission, 3M indicates that its plan is underfunded by half a billion dollars. V. Anand, *3M Decision First of Its Kind*, PENSIONS & INVESTMENTS, April 1, 2002. Moreover, with the downturn in the stock market, 3M's CFO does not quarrel with the estimate that if 3M's pension plan investments lose 5% this year, 3M will need to contribute $378 million to its pension plan. D. Henry, *The New Pinch From Pensions*, BUSINESS WEEK 44 (Aug. 5, 2002). Even if there had been a surplus legally relevant to this case in the 3M pension plan, it has disappeared along with the bull market. Thus, the larger the surplus, the more protection the participants have against the possibility that a plan would not be able to meet its obligations in the future or that the employer would not have the ability to make good on any deficit. Conversely, any time a plan's funding is negatively affected, as in the case here, participants suffer a threatened injury.

Participants have suffered an actual or threatened injury because of the negative effect on the security and amount of their benefits and the loss of amounts contributed to the pension plan on their behalf as deferred wages.

CONCLUSION

Amici support Petitioners' petition for a writ of *certiorari* to the Eighth Circuit and respectfully urge the Court to grant review of this case.

November 14, 2002

Respectfully submitted,

JENIFER BOSCO
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
44 Montgomery Street, # 2080
San Francisco, CA 94104

JEFFREY G. LEWIS
DANIEL M. FEINBEG
LEWIS & FEINBERG, P.C.
436-14th Street, Suite 1505
Oakland, CA 94612-2703

Counsel for *Amici Curiae*
NELA

MARY ELLEN SIGNORILLE*
AARP FOUNDATION

MELVIN R. RADOWITZ
AARP

601 E Street, N.W.
Washington, DC 20049

*Counsel of Record

Counsel for *Amici Curiae*
AARP